No. 21774

United States
COURT OF APPEALS
for the Ninth Circuit

ADELBERT G. CLOSTERMANN,
Executor of the Estate of Charles W. Feist,
Deceased,

Appellant,

v.

THE GATES RUBBER COMPANY,
a Colorado corporation,

Appellee,

APPELLEE'S ANSWERING BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Chief Judge

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JURISDICTIONAL STATEMENT

Appellant's reference to 28 U.S.C. § 1261 (Br. 2) as the foundation for this Court's jurisdiction is faulty; this Court's jurisdiction is premised upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant's counsel certifies that he examined U. S. Ct. of App. 9th Cir. Rules 18, 19 and 39, 28 U.S.C. (Br. 24) in connection with his preparation of the brief. Assuming the accuracy of the certification, it is obvious that appellant violated these rules. Some of the more glaring errors were brought to this Court's attention in appellee's motion to dismiss (denied October 10, 1967).

Appellee must now assume the expense and burden of preparing an extensive answering brief where a much less lengthy brief would normally suffice. Appellee must not only produce a full and fair factual statement of the case but also prepare appendices of statutes and exhibits. This Court will perceive that no appendix of appropriate statutes has been provided, although some repealed and inappropriate statutory material is abstracted and improperly paraphrased (Br. 9-12). There is no complete listing of exhibits (Br. 8-9). (See Appendix A and Appendix B, infra.)

1. "Introduction"

Appellee rejects appellant's "introduction" (Br. 2-4); this Court's rules envision no such section. The "introductory" matter repeats material presented elsewhere and ignores the express findings of the District Court. It is wholly argumentative and misleading.

The second paragraph (Br. 2) is irrelevant and there are no record citations to support the "poverty plea" there utilized to gain sympathy.

The fourth paragraph (Br. 2-3) (unsupported by record reference) does not accord with the facts. The fifth paragraph (Br. 3) suffers from like deficiencies and also constitutes a legal conclusion which was found adversely to the appellant at the District Court level.

The seventh paragraph (Br. 3) is unsupported by citations, is an erroneous legal conclusion, and is contrary to the findings of the District Court.

The eighth paragraph (Br. 3) is a statement of appellant's contentions, unsupported by notation that the District Court made a contrary determination; this statement is couched in misleading terms.

The tenth paragraph (Br. 3-4) is an unfair and argumentative interpretation of the District Court judgment.

The eleventh and twelfth paragraphs are statements of some of the appellant's contentions, phrased in misleading terms of fact and argument, all of which were found adversely to the appellant at the District Court level.

2. "Statement of the Case."

Appellee rejects appellant's "Statement of the Case" (Br. 4-5).

The statement consists of one sentence 21 lines

long of a virtually incomprehensible nature. It is not a statement of the case as required by this Court. The sentence contains no record references and fails to adequately refer to the legal proposition apparently relied on by appellant.

3. "Statement of the Facts."

Appellee rejects appellant's "Statement of the Facts" (Br. 5-12) as being unfair, argumentative and incomplete. For a more extensive comment upon the multitude of defects afflicting the "Statement of the Facts," appellee refers to and expressly incorporates herein its affidvait, memorandum in support and motion to dismiss.[1]

Gates Rubber Company (hereinafter referred to as "Gates"), a Colorado corporation, maintained a warehouse in Portland, Oregon for a number of years prior to the date of Mr. Feist's injury (II R. 31).

Columbine Stores, Inc. (hereinafter referred to as "Columbine") was a wholly-owned subsidiary of Gates [I R. 46 (Op. 4), Def. Ex. 3-7, 9-11, 11a-11d].[2] Columbine took over the operation of Bud's

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[1] An example of internal inconsistency is appellant's assertion that Mr. Elliott brought a claim form to Mr. Feist while the latter was under sedation (Br. 5). II R. 40 does not reveal whether or not Mr. Elliott personally called upon Mr. Feist. However, on numerous occasions counsel averred that the form was directed to Mr. Feist by mail. See, e.g., I R. 64, 87, II R. 9-10.

[2] There are three large State Industrial Accident Commission (hereinafter "S.I.A.C.") files in evidence. The foregoing exhibit numbers relate to those files generally according to the record supplied appellee. Appellee is not attuned

Tire Exchange, Inc., in January, 1962 (II R. 24). Pursuant to the Oregon Workmen's Compensation Act, Bud's Tire Exchange, Inc., was considered by the State Industrial Accident Commission to be a hazardous occupation; as such, Columbine was covered by the Act pursuant to its filing of January 5, 1962 (II R. 24). Due to the expense and difficulty of altering coverage under the then-existing Act, Columbine was permitted by the State Industrial Accident Commission to continue coverage and payment under the name of "Bud's Tire Exchange" with a cross-reference to Columbine Stores, Inc. (Def. Ex. 3-7, 9-11, 11a-11d; particularly inter-office memo June 30, 1965; cf. II R. 24).

The Oregon Workmen's Compensation Law was changed radically by the 1965 Legislature (effective January 1, 1966).[3] Since the injury and claim herein antedated the new Act, references in this brief are to the applicable portions of the "old" (pre-1966) Workmen's Compensation Law.

On January 31, 1965, Columbine was merged into Gates and, as such, Columbine ceased actively doing business in Oregon the next day (II R. 22-23; Def. Ex. 1; I R. 46; Def. Ex. 3-7, 9-11, 11a-11d, especially letter of August 24, 1965). Gates was now un-

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to the numbering system utilized by Appellant, e.g., references to S.I.A.C. files, Ex. 77, 78, 80 (Br. 5-6). Gates intends to refer on appropriate occasion to the S.I.A.C. files and records and, where possible, will specify the particular documents to which reference is intended.

[3] Except as to benefit provisions, which were effective earlier, but which have no effect upon the instant litigation.

der the Act by virtue of the "wholly-wholly" clause. ORS 656.022 (1965). At that time, Gates was covered and contributing to the fund, pursuant to the Oregon Workmen's Compensation Act (Def. Ex. 3-7, 9-11, 11a-11d, especially letter to Gates June 9, 1965; I R. 46).

The employer's monthly payroll and contribution report was made out by the Gates' clerk on March 15, 1965; in that report, the name "Bud's Tire Exchange" was obliterated and above it "Gates Tire Center, Medford," was inserted (Def. Ex. 3-7, 9-11, 11a-11d; Employer's Payroll and Contribution Report). The State Industrial Accident Commission received this report on March 17, 1965 (*Ibid*). A second notice was given on May 24, 1965 (Pl. Ex. 27). Although the reasons for the two notices were fully explained on trial (II R. 24-27), appellant still contends that the first notice was filed on May 24, 1965 (Br. 13).

Mr. Feist was the original plaintiff in the action; during the pendency of appeal he died and his attorney, in his capacity as executor, has been substituted as party-appellant.

Mr. Feist was a 10-year employee of Gates (II R. 41). On February 2, 1965, (subsequent to the merger of Columbine and Gates) Mr. Feist allegedly sustained an injury in the course and scope of his employment at the Gates' warehouse in Portland (Def. Ex. 9; II R. 43; I R. 2). Mr. Feist asserted that he was unable to continue work because of back

pain on April 22, 1965 (Def. Ex. 3-7, 9-11, 11a-11d). He was treated by a chiropractor on February 2, 3 and 4, 1965, for a lumbosacral sprain and possible deranged vertebra (Def. Ex. 3-7, 9-11, 11a-11d; particularly "Report of Investigator"). Subsequently, plaintiff was examined by numerous doctors and was hospitalized at various times because of complaints of back pain. (See generally Def. Ex. 2-7, 9-11, 11a-11d.) On May 20, 1965, Mr. Feist signed a State Industrial Accident Commission claim form (Def. Ex. 9). The form was signed by his doctor on May 21, 1965 (Def. Ex. 9), and was received by the State Industrial Accident Commission on May 24, 1965.

Pursuant to receipt of the claim form, the State Industrial Accident Commission returned it to Gates Rubber Company, the employer, on June 17, 1965, in order to obtain the appropriate signature (Def. Ex. 3-7, 9-11, 11a-11d; see Form 245, "Approval Required"). Mr. L. G. Gooley, assistant custodian of the State Compensation Department records, testified that lack of an employer's signature was not an unusual occurrence (II R. 18). One copy of the claim form was signed by Mr. Elliott, an employee of Gates Rubber Company, in Portland on June 18, 1965; a second form was signed on June 24, 1965. Another copy was filed without signature.

On July 28, 1965, the State Industrial Accident Commission received an investigation report from Mr. Calvin R. Bermeer, stating that during part

of the time between injury and filing, Mr. Feist had been under sedation (Def. Ex. 3-7, 9-11, 11a-11d).

The State Industrial Accident Commission entered its order of August 5, 1965, awarding Mr. Feist compensation for temporary total disability and for medical expenses from April 22, 1965, to June 30, 1965, (I R. 44; Def. Ex. 11). Mr. Feist's expenses were paid pursuant to the order only to the time of discovery of a cancerous condition; the Commission disclaimed responsibility for the cancerous condition as not resulting from the injury of February 2, 1965 (Def. Ex. 3-7, 9-11, 11a-11d; Letter of November 18, 1965).

On October 14, 1965, Mr. Feist, through his attorney, Mr. Clostermann (the present plaintiff) filed an application for rehearing with the State Industrial Accident Commission (Def. Ex. 3-7, 9-11, 11a-11d; application for rehearing and letter of October 13, 1965). *On October 21, 1965, this application was denied because of untimely filing* (Def. Ex. 10).

Mr. Feist, through his attorney, Mr. Clostermann, filed a complaint and demand for jury trial in the United States District Court for the District of Oregon on September 13, 1965 (I R. 8). He averred damages for personal injuries arising out of an accidental injury sustained in the course and scope of his employment for the defendant. *Ibid.*

Defendant-appellee Gates answered, generally denying plaintiff's contentions, and affirmatively alleging contributory negligence. *A second affirmative*

and supplemental defense alleged that, on February 2, 1965, appellee was an employer in Oregon covered by the Oregon Workmen's Compensation law; that subsequent to the date of the alleged injury plaintiff had made claim with the State Industrial Accident Commission for remedies and benefits provided by such law; that his claim had been approved and allowed; that plaintiff had received and accepted the remedies and benefits of the Workmen's Compensation Act and was therefore exclusively confined to the remedies of that law (I R. 12-13).

On November 2, 1965, plaintiff filed a "Reply" (I R. 15-16) admitting that the State Industrial Accident Commission did make payment to the plaintiff but asserting that the payments were not made pursuant to law but rather "erroneously, illegally and unlawfully made by the Commission under a mistake of law and fact and a complete misunderstanding between defendant, plaintiff and the State Industrial Accident Commission of Oregon, and plaintiff has no authority to receive any remedies purportedly granted pursuant to said Act." (I R. 16.)

The issue of whether appellant's sole and exclusive remedy against defendant was pursuant to the Oregon Workmen's Compensation Act was segregated and tried to the Court sitting without a jury (see e.g. I R. 43-44). All other issues and defenses were reserved.

Following presentation of evidence on two separate occasions, the submission of exhaustive legal

memoranda (I R. 63-125), and oral argument, the Honorable Gus J. Solomon, Chief Judge of the United States District Court for the District of Oregon, ordered dismissal of plaintiff's action. A judgment order dated November 25, 1966, was entered (I R. 48; see also opinion accompanying judgment, I R. 43-47).

On December 5, 1966, appellant filed his "Motion to Set Aside Judgment or to Amend Judgment, or in the Alternative, a New Trial" (I R. 49). This motion likewise was the subject of extensive memoranda and briefing (I R. 46-48). The motion to set aside judgment was denied (I R. 60) by docket entry of January 17, 1967.

Notice of Appeal was filed February 15, 1967 (I R. 61) from the order of January 17, 1967. Appellant's assertions to the contrary notwithstanding, no statement of points on appeal was ever filed and no designation of the record was ever made (Affidavit of Ridgway K. Foley, Jr., 2, in support of appellee's motion to dismiss).

SPECIFICATION OF ERROR

Appellee rejects appellant's specification of error (Br. 12). The proper order from which an appeal was to be taken was the judgment order entered November 25, 1966. There is no specification in appellant's brief concerning the November 25, 1966 judgment. The specification itself is a recognition of the

limited grounds upon which the appellant may appeal. Nevertheless, appellant wanders far afield in his argument, attempting to reopen the November judgment. This Court, in its discretion, should refuse to consider any points relating to the judgment of November 25, 1966, and should treat these grounds as waived. See *Mason* v. *Anderson-Cottonwood Irrigation District*, 126 F.2d 921 (9th Cir. 1952) (cert. denied 316 U.S. 697, rehearing denied 317 U. S. 704); *United States* v. *Shingle*, 91 F.2d 85 (9th Cir. 1937) (cert. denied 302 U.S. 746); *Dower* v. *United Air Lines, Inc.*, 372 F.2d 684 (9th Cir. 1954); *Greyhound Corporation* v. *Blakley*, 262 F.2d 401 (9th Cir. 1958).

Moreover, appellant claims "error" in denial of his motion to set aside or amend the judgment. Such a denial must have been premised upon findings of fact and/or conclusions of law made by the District Court. U. S. Ct. of App. 9th Cir. Rule 18 (2) (d), 28 U.S.C., provides that the appellant must set out with precision wherein the findings of fact and conclusions of law are erroneous. Appellant has not done this. Appellant's brief makes no reference to the proceedings concerning the denial of the motion from which he appeals. Obviously, appellant should have quoted the findings and conclusions considered erroneous, specified the grounds urged at trial for objection to these rulings and any evidence appropriate thereto, and referred to the location in the record where the conduct occurred. Failing this, this Court is not required to consider any "error" presented by

the so-called specification of error. cf. *Ambrose* v. *United States*, 280 F.2d 766 (9th Cir. 1950).

SUMMARY OF ARGUMENT

Columbine was, in fact, liquidated into, or merged with, Gates on January 31, 1965. At the time of the injury, Gates and its employee, Mr. Feist, were subject to the Oregon Workmen's Compensation Act. None of the ORS 656.312 (1965) exceptions altered Mr. Feist's status. Furthermore, there were ample procedural grounds upon which the District Court could base a decision denying Mr. Feist's motion for a new trial. The fact that application for benefits under the Act was filed beyond the time limitation imposed by ORS 656.274 (1965) does not preclude the employer from invoking the protection of the Workmen's Compensation Act.

The District Court found as a fact that Mr. Feist's employer, Gates, was a contributor to the State Industrial Accident Fund at the time of the injury. The District Court concluded that Mr. Feist's sole and exclusive remedy was his claim against the fund. There is substantial evidence supporting the District Court's findings and conclusions, and the judgment should be affirmed; the decision was not "clearly erroneous" and this Court cannot say that it has a "firm conviction" that error was committed.

1. Columbine Stores, Inc., was, in fact, merged into the Gates Rubber Company on January 31, 1965.

Throughout his brief, appellant continually asserts that Columbine was not merged into Gates on January 31, 1965 (Br. 16). Such statements are misleading and incorrect.

First, the trial court's opinion (I R. 46) held that Columbine was liquidated into Gates on January 31, 1965. There was abundant evidence to support this determination (II R. 22-23; Def. Ex. 1; Def. Ex. 3-7, 9-11, 11a-11d generally).

The District Court's opinion, amply supported by the evidence, correctly indicates the facts existing at the time of the corporate merger. Such a finding of fact by the trial court, based upon both written and testimonial evidence, should not be disturbed by this Court. See e.g., Rule 52, Fed. R. Civ. P., 28 U.S.C.; *General Casualty Company* v. *School District No. 5, Baker County, State of Oregon, ex rel F. C. Lyons*, 233 F.2d 526 (9th Cir. 1956); *McAllister* v. *U. S.*, 348 U.S. 19 (1954); *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960); *United States* v. *Gypsum Co.*, 333 U.S. 364 (1948) (rehearing denied 333 U.S. 869).

In addition to making sniping asides regarding the liquidation or merger of Columbine into Gates on January 31, 1965, appellant's continued use of such words as "collusion" (Br. 13) and "corporate maneuvering" (Br. 14-15) are a blatant attempt to

influence this Court. Appellant has judicially admitted the absence of fraud in the instant case. The District Court ruled that no issue of fraud existed (II R. 29). Appellant's claim that Columbine was not liquidated or merged into Gates on January 31, 1965, in face of the admissions, statements and evidence is nothing less than an allegation of fraud against Gates and the State Industrial Accident Commission, despite his judicial admissions to the contrary (II R. 28-29).

Moreover, it is illogical to assert that a "multi-million dollar corporation" (Br. 2) would assume the cost and trouble, let alone the possibility of severe legal consequences, of so-called "corporate maneuvering" in order to insulate itself from liability founded upon the dubious claim of a single workman. Such an assertion seems particularly inherently improbable when examined in light of the facts of this case. There is no reason to assume that the liquidation/merger did not occur on January 31, 1965. There is no evidence the consolidation did not occur. Any assertion to the contrary is explicable by appellant's misunderstanding of the corporate records.

2. The trial court correctly determined that Gates was to be granted the protection of the Workmen's Compensation law in this case.

Appellee deems it appropriate to subdivide its second argument into three sections because of the incomprehensible argument presented by appellant.

(a) Gates and its employee, Mr. Feist, were subject to the Act at the time of the injury.

Columbine, doing business as Bud's Tire Exchange, Inc., was engaged in a hazardous occupation and made proper filing pursuant to the existent Workmen's Compensation Act (I R. 46). It contributed to the State Industrial Accident fund (II R. 22). When Columbine was liquidated into, or merged with, Gates on January 31, 1965 (I R. 46; II R. 22-23; Def. Ex. 1; Def. Ex. 3-7, 9-11, 11a-11d), Gates became subject to the Workmen's Compensation Act, pursuant to the "wholly, wholly" clause of ORS 656-.022 (1965). At this point, automatic coverage pursuant to the Act was afforded Gates and its employees until June 30, 1965. ORS 656.026 (1965). This coverage would have existed even if Gates had rejected the Act immediately upon the merger with Columbine (I R. 46). The records reveal contribution by Gates to the Fund (Def. Ex. 3-7, 9-11, 11a-11d) and based upon these contributions, Mr. Feist was able to recover temporary total disability payments and medical reimbursement.

Since the automatic coverage was afforded both employer and employee, once the plaintiff had "knowingly applied for and received Workmen's Compensation benefits" he was precluded from bringing any action for damages against his employer. ORS 656-.152 (1965); *Shoemaker* v. *Johnson*, 241 Or. 511, 407 P.2d 257 (1965); *Bandy* v. *Norris, Beggs & Simpson*, 222 Or. 1, 19, 342 P.2d 839, 351 P.2d 445 (1960);

Kowcun v. *Bybee*, 182 Or. 271, 296, 186 P.2d 790 (1947).

(b) No appropriate exception pursuant to ORS 656.312 (1965) exists in the present case.

Appellant contends that Gates' alleged violation of ORS 656.052 (1965) operated to bring into play an exception under ORS 656.312 (1965) (as explained in *Kowcun* v. *Bybee*, supra, 182 Or. at 296), thereby permitting Mr. Feist to commence an action against Gates for damages notwithstanding his pursuit of the compensation remedy. However, appellant misinterprets the affect of the Act on the present situation.

Initially, which subsection of ORS 656.052 (1965) applies to this litigation? Appellant's brief presents a misleading synopsis of the statute by quoting merely the title thereof, and two sections which state the result of the statute (Br. 9). The statute in its entirety envisions three separate possibilities (see App. A, infra), any one of which might arguably apply to the present situation. Each would have a distinct and separate effect.

The first possibility concerns a situation where an employer *begins* to engage in a hazardous activity. Here the employer must file notice of the fact that he is going to commence operations in a hazardous activity before he actually begins.

The second alternative concerns a situation where an employer changes his name and address. The em-

ployer must file an amended statement giving his new name and address within 30 days.

The third situation concerns an employer who has filed the requisite notice pursuant to this statute, or who is a contributor to the fund upon a nonhazardous-activity basis; when such an employer subsequently commences to engage in a hazardous activity incidental to such an occupation, *no notice need be filed.* If the occupation is separate from the original activity, then notice is required pursuant to this subsection.

The facts presented, and as found by the District Court, indicate that the application of the third subsection of ORS 656.052 (1965) would be most consonant with legislative intention. The employer, Gates, by means of its wholly-owned subsidiary, Columbine, had filed the required notice (I R. 46) and had contributed to the State Industrial Accident Fund (II R. 22). When the liquidation and merger of Columbine into Gates occurred on January 31, 1965, Gates then became engaged in a hazardous occupation (the Medford tire recapping operation) incidental to its major operations in the state of Oregon. The nature of the two businesses reveals the incidental effect of the Medford division. In such a case, no notice pursuant to ORS 656.052(3) (1965) is required. Therefore, Gates did not violate ORS 656.052 (1965). Lacking a violation, no exception pursuant to ORS 656.312 (1965) is appropriate. If there is no exception under ORS 656.312 (1965), appellant is preclud-

ed from bringing this action. ORS 656.152 (1965); *Bandy* v. *Norris, Beggs & Simpson*, supra; *Kowcun* v. *Bybee*, supra.

The District Court was aware that the State Industrial Accident Commission had applied the appropriate subsection. The required statutory notice had been filed by a firm engaged in a hazardous industry. That company had subsequently been merged into the parent company and no statutory notice was filed at that time. Upon a determination that continuity exists between employers providing employee coverage (notwithstanding any mechanics of corporate merger), it is the practice of the State Industrial Accident Commission to treat the required notice as having been given. This administrative policy was evidenced by: (1) several exhibits (there are three State Industrial Accident Commission files in evidence, and numerous documents contained therein, particularly a letter of April 21, 1965, which evidence this policy); (2) the fact that the claim in the instant case was not made "a cost-recovery claim" pursuant to ORS 656.054 (1965) and (3) the fact that the State Industrial Accident Commission did not compel Mr. Feist to bring an action for damages against his employer pursuant to ORS 656.315 (1965).

The administrative policy is not without sound support and the implicit major premise has been judicially recognized as recently as *Long* v. *State Industrial Accident Commission*, — Or. —, 424 P.2d 236, 239 (1967).

> "It is clear here that Mr. McBride did not abandon his occupation as a nursing home operator; nor did he change his place of business. The state concedes not only that the Hillsboro Nursing Home continued in full operation during this entire period and thereafter, but that the accident happened within 30 days after plaintiff began working at Hillaire. The statute proscribes an employer from changing his place of business. It nowhere proscribes an employer from adding a second or additional place of business, whether permanently or temporarily. It is the identity of the occupation which is significant; not the name under which it is carried on. A jury could well find Mr. McBride merely extended his existing occupation temporarily to include a second establishment."

Appellee believes that the foregoing sufficiently answers any possible contention of noncompliance with the statute. Nevertheless, additional briefing is required by the vagueness of appellant's brief. The preceding analysis conforms to the District Court's opinion and should be given great weight since it was supported by clear and substantial evidence.

The second possible alternative would be the application of ORS 656.052(2) (1965): change of name and address. The District Court determined that Columbine had made proper filing [pursuant to ORS 656.052 (1965)] with the State Industrial Accident Commission (I R. 46). Appellant does not dispute this fact. It is possible to interpret the merger of Columbine and Gates as a "change of employer's name."

If so interpreted, the employer is permitted 30 days within which to file his notice [ORS 656.052(2) (1965)]. The State Industrial Accident Commission received notice March 17, 1965, some 15 days after the 30-day grace period provided by ORS 656.052(2) (1965). (Def. Ex. 3-7, 9-11, 11a-11d; II R. 25-27).

ORS 656.052(2) (1965) grants the employer a 30-day "grace period" within which to file the required notice before he violates the statute. An employer cannot violate ORS 656.052 (1965) until the lapse of 30 days from the time of the event necessitating notice.

Mr. Feist was injured on February 2, 1965 (I R. 46). This was 28 days before the lapse of the statutory grace period. Since Mr. Feist was injured during the grace period, if subsection (2) applies, Gates is not to be denied the benefits of ORS 656.002 to ORS 656.590 (1965). Moreover, ORS 656.312 (1965) would only provide appellant's claimed exception to the *Kowcun*, supra, and *Bandy*, supra, decisions if a violation of ORS 656.052 (1965) is present. Without violation, ORS 656.312 (1965) is inapplicable and Mr. Feist is precluded from pursuing any action against Gates because he knowingly and intentionally received compensation pursuant to the Act. ORS 656-.152 (1965); *Bandy* v. *Norris, Beggs & Simpson*, supra; *Kowcun* v. *Bybee*, supra.

The third possible alternative (and the least likely) is the application of ORS 656.052(1) (1965). Apparently that is the premise of appellant's claim.

ORS 656.052(1) (1965) *applies only when, without any previous connection with the Workmen's Compensation Act (either directly or indirectly by virtue of operations of subsidiaries) an employer commences to engage in a hazardous occupation.* This subsection does not apply to the instant case and the trial court should be affirmed.

In determining that either ORS 656.052(2) or (3) (1965) applied to the present case, the District Court was interpreting Oregon law. In so doing, it did not have the benefit of any Oregon Supreme Court decisions directly on point. Judge Solomon was in the position of being a local judge, with a long tenure on the bench and extensive prior experience in private practice in Oregon. He was in an excellent position to interpret local law. In such a case, this Court has believed that the considered views of the District Court should be accepted unless the appellate court is clearly persuaded that they are erroneous. *Western Oil & Fuel Company* v. *Kemp*, 245 F.2d 633, 644 (9th Cir. 1957); *Citrigno* v. *Williams*, 255 F.2d 675 (9th Cir. 1958); *Bellon* v. *Heinzig*, 347 F.2d 4 (9th Cir. 1965). Can this Court say that the Chief Judge of the Oregon District Court based his opinion upon something less than clear and substantial evidence and that his findings and conclusions leave this Court with a firm conviction of error? The answer is *no.*

There are no Oregon cases indicating that the court erred in his interpretation of ORS 656.052

(1965). To the contrary, the manner in which the claim was handled by the State Industrial Accident Commission (the administrative body which, at the appropriate time, was charged with initial administration of the law) clearly reinforces the validity of the trial court's ruling. Gates did contribute to the fund, so there was no intent to evade the law; clearly the purposes of the Workmen's Compensation Act have been met. Appellant certainly has not offered either citation or evidence to show the District Court decision to be clearly erroneous.

Therefore, since the statutory exception provided by ORS 656.312 (1965) was inapplicable to the present case, Mr. Feist was precluded from pursuing an action for damages against his employer because he knowingly applied for and received benefits under the Workmen's Compensation Act. ORS 656.152 (1965); *Bandy* v. *Norris, Beggs & Simpson,* supra; *Kowcun* v. *Bybee,* supra. Mr. Feist never tendered back any funds received from the State Industrial Accident Commission.

(c) There are procedural grounds upon which the District Court could have based its decision denying the motion for a new trial.

Heretofore Gates has demonstrated that there were substantive grounds supporting the District Court's ruling denying the motion of Mr. Feist for a new trial or to amend judgment. In addition, procedural grounds for the denial were present.

The Oregon Supreme Court in *Bandy* v. *Norris,*

Beggs & Simpson, 222 Or. 1, 19, 342 P.2d 839, 351 P.2d 445 (1960), stated:

> "* * *. Therefore plaintiff, since she is proceeding against an employer, unless she denies having received benefits, must now allege and show that she comes under one of the exceptions of ORS 656.312. * * *."

Mr. Feist thus had the burden of proving any exception at trial. However, the issue was not even raised at trial. (See I R. 1-48, Passim.) Appellant first mentioned the possibility of such an exception upon the motion for a new trial. Thus, appellant failed to sustain the burden of proof at trial as required by *Bandy*, supra, and the District Court, in its discertion could deny the motion for a new trial. This would be a proper case for such a discretionary act.

What Mr. Feist actually tried to do was to raise a new theory upon his motion for a new trial. 6A Moore's Federal Practice (2nd. ed.) 3769, § 59.07, states:

> "Just as at law, a rehearing in equity and its present counterpart, a new trial on a court action, will not lie merely to relitigate old matters; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial."

Since Mr. Feist was attempting to present a novel theory upon his motion for new trial, the District Court had adequate procedural grounds to deny such a motion.

Additionally, the grant or denial for a motion for a new trial pursuant to Rule 59(b), Fed. R. Civ. P., 28 U.S.C. is a matter which is largely within the District Court's discretion. *Natural Resources, Inc.* v. *Wineberg*, 349 F.2d 685 (9th Cir. 1965) (cert. denied 382 U.S. 1010); *States* v. *Isthmian Lines*, 319 F.2d 798 (9th Cir. 1963). Unless clearly abused, the Appellate Court will not disturb the trial court's exercise of its discretion. *Norwich Union Fire Society, Ltd.* v. *Glasser*, 294 F.2d 385 (9th Cir. 1955).

3. The fact that an application for benefits pursuant to the Workmen's Compensation Law was filed beyond the time limitation imposed by O.R.S. 656.274 (1965) does not preclude the employer from invoking the protection of the Act.

Appellant claims the recent decision of *Johnson* v. *State Compensation Department*, — Or. —, 425 P.2d 496 (1967) has some important effect upon the rights of the parties (Br. 16). This contention demonstrates confusion regarding the applicable law.

Johnson, supra, in no way altered the rules appropriate to the instant case. Numerous Oregon decisions have held that the time limitation pursuant to ORS 656.274 (1965) must be adhered to. [ORS 656.274 (1965) governs the filing of Workmen's Compensation claims.] See *Lough* v. *Industrial Accident Commission*, 104 Or. 313, 207 P. 354 (1922); *Rosell* v. *State Industrial Accident Commission*, 164 Or. 173, 95 P.2d 726 (1939); *Wooldridge* v. *Arens, et al*, (1940) 164 Or. 410, 98 P.2d 1, 102 P.2d 717;

Tice v. *State Industrial Accident Commission*, 183 Or. 593, 95 P.2d 188 (1948). By asserting that the *Johnson* decision changed the law appropriate to this case, appellant misleads the Court.

Johnson was not concerned with noncompliance with the three months' filing requirement of ORS 656.274 (1965); it held that, after a sufficient showing had been made to permit a filing of a claim within an additional nine months provided for by ORS 656.274 (1) (1965), the claimant must either file his claim within a reasonable time after the expiration of the original three-months' period permitted by law or present satisfactory evidence to show why he had not done so. Obviously, this is a very different situation from the present case, and appellant does not claim it to be analogous. The *Johnson* claim was filed seven months after the normal three-months' filing period; in the instant case, less than one month had passed after the normal filing period. Therefore, *Johnson* is factually inapposite.

In any event, there are several reasons why this issue should not be raised now.

First, appellant has waived his right to assert this issue by failing to include it in his application for rehearing presented to the State Industrial Accident Commission (Def. Ex. 3-7, 9-11, 11a-11d.)

ORS 656.284 (1965) provides that any claimant who is dissatisfied with any order made pursuant to ORS 656.282 (1965) must file an application for rehearing within sixty days of that order (See Def.

Ex. 11). ORS 656.284 (1965) further states that the claimant shall be deemed to have waived all objections, irregularities, or any other illegalities except those which are specifically set forth in such an application. A late filing of a petition for rehearing constitutes such a waiver to all objections, irregularities and illegalities, and the Oregon Supreme Court has strictly adhered to this rule. *White* v. *State Industrial Accident Commission*, 163 Or. 476, 478-480, 96 P.2d 772, 98 P.2d 955 (1940). In the present case, Mr. Feist's petition for rehearing was denied because of late filing (Def. Ex. 10). He waived any right to claim any alleged irregularity or procedural defect in the award of his compensation.

Appropriate procedures are provided by statute to contest the validity of the State Industrial Accident Commission's determination. If Mr. Feist and his counsel, the appellant, failed to pursue these procedures, it should not now be open to them to attack the administrative decision in this forum. ORS 656-.284 (1965). This is particularly true when these issues were not presented as a part of the appellant's case at trial, nor considered or presented in motion for a new trial or amendment of judgment. *United States* v. *Hoth*, 207 F.2d 386 (9th Cir. 1953).

Second, by knowingly filing his claim and by accepting the benefits of the order of the Workmen's Compensation Board, the appellant can be said to have waived his rights to contest the efficacy of the award. If Mr. Feist contended that the Commission

lacked authority to grant his award, he has an obligation to launch a proceeding to set aside such an order. He did not attempt to do so and therefore he is barred under *Bandy* v. *Norris, Beggs & Simpson*, supra.

Third, even if it can be assumed that Mr. Feist's right to raise this issue on appeal has not been waived, his argument should have no effect upon the disposition and decision of the District Court. Since the issue was interjected for the first time on appeal, appellant's argument should be stricken summarily. The award made, pursuant to the untimely claim, was made under such circumstances that it complied with ORS 656.274 (1965). That statute provided that the Commission could, in its discretion, and upon a sufficient showing being made, permit the filing of cases within one year of the date of the accident. The issue of whether or not reasonable cause has been shown for a late filing is always a question of fact. *Kehoe* v. *State Industrial Accident Commission*, 214 Or. 629, 634, 331 P.2d 91 (1958); *Wooldridge* v. *Arens, et al*, 164 Or. 410, 98 P.2d 1, 102 P.2d 717 (1940).

There is evidence that the Commission was advised of the fact that Mr. Feist had been under sedation for a part of the time following his accident (Def. Ex. 3-7, 9-11, 11a-11d, especially "Report of Investigation"). The Commission was aware of any mitigating circumstances involved in the late filing when it heard Mr. Feist's claim and issued its order

based thereon (Def. Ex. 3-7, 9-11, 11a-11d). The Board had discretion to hear an untimely claim pursuant to ORS 656.274 (1965), and if it determined to decide such a claim, it had the power to issue an order based upon that claim for compensation. In support of this exercise of discretion, it is presumed that official duty has been regularly performed. ORS 41.-360 (15) (1967). This rebuttable presumption has been neither attacked nor overcome by appellant.

Fourth, it may be argued by analogy that the Commission has waived any right to question the late filing of the claim, *Kehoe* v. *State Industrial Accident Commission*, supra. The Commission permitted Mr. Feist to file an application for compensation, gave the application a claim number, indicated thereon the number of the employer's account with the Commission, directed the employee to undergo a physical examination by one of the Commission's examining physicians, and thereafter proceeded to hear the application for rehearing. Such an administrative action should bar any subsequent questioning of the claim.

Fifth, appellant errs in his "legal conclusion" that the late filing resulted in an award of such a nature that a right against the employer was created in spite of the fact that the claimant received compensation. He contends that the late filing resulted in an award made pursuant to ORS 656.314 (1965). This conclusion is incorrect. Analysis of Mr. Feist's argument reveals that appellant is claiming that the late filing

created a situation whereby an independent cause of action against the employer arose. Actually, that statute *pre-supposes* that an independent cause of action against the employer exists, and provides for benefits under the Act in spite of this existing cause of action. The illogic involved in appellant's contention that a statute that *presupposes* an independent cause of action can *create* an independent cause of action is obvious.

The untimely filing of Mr. Feist's claim with the State Industrial Accident Commission can have no effect upon the decision of this Court.

Finally, Gates rejects as improper and misleading appellant's four-page "summation of argument" (Br. 19-22). While it is certainly argumentative, it is in no sense a summary and fails to comply with the rules of this Court.

CONCLUSION

This Court has often stated that when the District Court sits as a fact-finder, its decision will not be altered unless it is so clearly erroneous that this Court is left with a firm conviction that error has been committed. Appellant sought and recovered Workmen's Compensation benefits. The benefits were made possible by contributions made by the appellee (employer) to the State Industrial Accident Fund. Appellant pursued his remedy to the point of seeking a *rehearing* of his claim against the Fund. Now appellant (dissatisfied with his award) brings this ac-

tion against his employer; obviously his approach is in direct contravention to his theory while claiming against the Fund.

The Workmen's Compensation Law provides a sure and certain compensation plan, without regard to fault, for employees injured on-the-job. In exchange for the certainty of the payment of compensation, workmen agree to forego their common-law claims against their employers. Appellant fits none of the few exceptions to the rule.

The judgment of the District Court upon the segregated issue should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellee's brief is in full compliance with those rules.

RIDGWAY K. FOLEY, JR.
Of Attorneys for Appellee

APPENDIX A

APPENDIX OF STATUTES

ORS 41.360. *Disputable presumptions.* All presumptions other than conclusive presumptions are satisfactory, unless overcome. They are disputable presumptions, and may be controverted by other evidence, direct or indirect, but unless so overcome, the jury is bound to find according to the presumption. The following are of that kind:

* * * * *

(15) Official duty has been regularly performed.

* * * * *

OREGON REVISED STATUTES (1965):

656.022 *Employers engaged in hazardous occupations as subject to workmen's compensation law.* (1) All persons engaged as employers in any of the hazardous occupations specified in ORS 656.082 to 656.086 shall be subject to ORS 656.002 to 656.590; provided, that any such employer may be relieved of certain of the obligations imposed by those statutes and shall lose the benefits conferred by those statutes by filing with the commission written notice of an election not to be subject thereto in any manner specified in those statutes.

(2) Where an employer is engaged in a hazardous occupation, as defined in ORS 656.082 to 656.086, and is also engaged in another separate occupation or other separate occupations not so defined as hazardous, he shall not be subject to ORS 656.002 to 656.590 as to the sep-

arate nonhazardous occupations, nor shall his workmen wholly engaged in such separate nonhazardous occupations be subject thereto except by an election as authorized by ORS 656.034.

(3) Employers who are engaged in an occupation partly hazardous and partly nonhazardous come under ORS 656.002 to 656.590 as if the occupation were wholly hazardous.

(4) It is the purpose of this section that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or wholly outside the provisions of ORS 656.002 to 656.590.

656.026 *Employers engaged in hazardous occupations automatically covered until they give notice of rejection; effective date of rejection and liability of employer.* Any employer engaged in a hazardous occupation defined by ORS 656-.082 to 656.086, who does not give to the commission written notice of his rejection under ORS 656.024 is subject to ORS 656.002 to 656-.590 until and including the following June 30, and thereafter until and including June 30 of each succeeding year, unless, before June 1, 1959, or before June 1 of any succeeding year, his rejection is filed with the commission, whereupon, from and including the succeeding July 1, the status of the employer giving such notice shall be that resulting from the giving of the notice provided for in ORS 656.024.

656.052 *Employers engaged in hazardous occupations to file statement with commission giving address and description of occupation; effect of failure to do so.* (1) No person subject to

ORS 656.002 to 656.590 shall engage as an employer in any of the hazardous occupations enumerated in ORS 656.084, unless and until the employer has filed with the commission a statement in writing, giving the name and address of the employer and describing the hazardous occupation in which the employer is engaged or proposes to engage.

(2) If the name or address of an employer is changed, the employer shall, within 30 days of such change, file an amended statement setting forth the correct name and address of the employer.

(3) If an employer who has given the notice required in this section as to any occupation, or who is a contributor to the Industrial Accident Fund upon a nonhazardous occupation, engages in a hazardous occupation incidental to such occupation, the notice required in this section need not be given. If an employer engages in a hazardous occupation separate from such occupation, the notice required in this section shall be given.

(4) No employer shall engage in a hazardous occupation if the statement required by this section has not been filed.

(5) Any employer who engages in a hazardous occupation, as defined in ORS 656.082 to 656.086, in violation of this section, is not entitled to the benefits or protection of ORS 656.002 to 656.590.

656.054 *Liability of employer for injuries arising prior to filing of the notice under* ORS

656.052. (1) If a workman of an employer engaged in a hazardous occupation receives an accidental injury prior to the time the employer has filed with the commission a notice of engaging in a hazardous occupation, as required by ORS 656.052, and such workman or other beneficiaries file a valid claim for compensation with the commission on account of said injury, the cost of such claim to the Industrial Accident Fund but not less than $100 nor in excess of $1,000 shall be a claim against the employer. The commission shall recover such claim from the employer for the benefit of the Industrial Accident Fund.

(2) If a workman appeals from an order of the commission in any claim in which the alleged accident occurred before the employer filed with the commission the notice required by ORS 656.052, the commission forthwith shall serve upon the employer a copy of the complaint and a demand that the employer intervene in the appeal as a party defendant. Such service shall be made in the manner provided by law for the service of summons. The employer may intervene in the appeal as a party defendant within 20 days after the service of the complaint or within such further time as may be allowed by order of the court. If the employer does not intervene in the appeal, the court shall have jurisdiction of such employer to the same extent as if he had intervened.

ORS 656.152 (1965) *What are compensable injuries; right to compensation as in lieu of claim against employer.* (1) Every workman subject to ORS 656.002 to 656.590 while employed by an employer subject to ORS 656.002

to 656.590 who, while so employed, sustains an accidental injury, or accidental injury to prosthetic appliances arising out of and in the course of his employment and resulting in his disability, or the beneficiaries of such workman, if the injury results in death, are entitled to receive from the Industrial Accident Fund the sums specified in ORS 656.002 to 656.590. The repair or replacement of prosthetic appliances so injured shall be provided subject to the approval of the Commission.

(2) The right to receive such sums is in lieu of all claims against his employer on account of such injury or death, except as otherwise specifically provided in ORS 656.002 to 656.590.

656.156 *Injuries resulting from the deliberate intention of the injured workman or the employer.* (1) If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, neither the workman nor the widow, widower, child or dependent of the workman shall receive any payment whatsoever out of the Industrial Accident Fund.

(2) If injury or death results to a workman from the deliberate intention of his employer to produce such injury or death, the workman, the widow, widower, child or dependent of the workman may take under ORS 656.002 to 656.590, and also have cause for action against the employer, as if such statutes had not been passed, for damages over the amount payable under those statutes.

656.274 *Time within which applications must*

be filed. (1) No application shall be valid or claim thereunder enforceable in nonfatal cases unless such claim is filed within three months after the date upon which the accident occurred, but the commission may, in its discretion, upon a sufficient showing being made, permit the filing of a claim in a nonfatal case within one year of the time the accident occurred.

(2) If a workman, as a result of an accidental injury, has been rendered mentally incapable of filing a claim, a claim may be filed by the workman within 60 days after the removal of such mental incapacity or during such incapacity on behalf of the workman, by his parents, spouse, guardian, employer or physician. Any such claim must be filed within one year from date of the accidental injury.

(3) In any fatal case a claim may be filed within one year after the date upon which the accident resulting in death occurred.

(4) If a workman who has filed a claim for compensation within the time permitted by this section dies as the result of the accidental injury but before the commission has entered an order terminating compensation for temporary total disability, his widow or other beneficiaries may file a claim within 60 days after the death of the workman.

(5) If a workman, during his lifetime, has filed a claim for which he has been paid compensation, which claim has been closed for payment of compensation for temporary total disability, dies after the expiration of one year from the

date of the accidental injury and as a result of the accidental injury the commission may, in its discretion, permit the filing of a fatal claim within 60 days after such death.

(6) This section does not limit the filing of a claim in fatal cases to less than one year after the date upon which the fatal accident occurred.

656.275 *Time within which commission must accept or reject application.* The commission shall accept or reject an application for compensation or benefits within 90 days from the time such application is filed pursuant to ORS 656.-274.

656.284 *Application for rehearing as prerequisite to appeal to courts; procedure on rehearing.* (1) Any claimant aggrieved by any order, decision or award under ORS 656.282, including, but not limited to, a denial of further medical or hospital care, must, before he appeals to the courts, file with the commission an application for rehearing within 60 days from the day on which the copy of such order, decision or award was mailed to the claimant.

(2) The application shall set forth in full detail the grounds upon which the claimant considers such order, decision or award is unjust or unlawful, and shall include every issue to be considered by the commission. The application must contain a general statement of the facts upon which the claimant relies in support thereof.

(3) The claimant shall be deemed to have

waived all objections, irregularities and illegalities concerning the matter upon which the rehearing is sought other than those specifically set forth in such application for rehearing. The application may be amended after filing but not later than the date of rehearing.

(4) If the commission, in its opinion, has previously fully considered all matters raised by the application it may deny the application and confirm its previous decision or award or, if the evidence on file with the commission sustains the applicant's contention, it may allow the relief asked in the application. Otherwise it shall order a rehearing to decide the issues raised.

(5) If a rehearing is granted, the commission shall consider all facts, including those arising since making the order, decision or award involved and enter such order as the facts and law warrant. In every such case where a rehearing is held and a transcript of the testimony is taken, the claimant shall be entitled to a copy of the same upon payment to the commission for the cost of the transcript.

(6) An application for rehearing is deemed denied by the commission unless it has been acted upon by final order within 60 days from the date of filing; provided, that the commission may, in its discretion, extend the time within which it may act upon the application, not exceeding 30 days without claimant's approval or 60 days with claimant's approval.

656.312 *Election to recover damages when right of action exists against third person or delinquent employer.* If a workman of an employer

engaged in a hazardous occupation in violation of ORS 656.052, or of an employer in default, as provided in ORS 656.560, receives an accidental injury in the course of his employment, or if a workman receives an accidental injury due to the negligence or wrong of a third person, entitling him under ORS 656.154 to seek a remedy against such third person, such workman or, if death results from the injury, the other beneficiaries shall elect whether to recover damages from such employer or third person. If a workman leaves beneficiaries who are minors, the right of election shall be exercised by their surviving parent, if any; otherwise, such election shall be exercised by the guardian.

656.314 *Payment of compensation notwithstanding existence of cause of action; lien of commission on cause of action for compensation paid.* (1) The workman or his beneficiaries, as the case may be, shall be paid the benefits provided by ORS 656.002 to 656.590 in the same manner and to the same extent as if no right of action existed against the employer or third party, until the amount of benefits that the workman or beneficiaries are entitled to under ORS 656.002 to 656.590 can be determined and until damages are recovered from such employer or third party.

(2) The commission has a lien against the cause of action in the amount of compensation paid to the workman or his beneficiaries, including the cost of first aid and other medical, surgical and hospital service, which lien shall be preferred to all claims except the cost of recovering such damages.

656.316 *Authority of commission to compel election and prompt action against third person.* (1) The commission may require the workman or other beneficiaries or the legal representative of a deceased workman to exercise the right of election provided in ORS 656.312 by serving a written demand by registered mail or by personal service upon such workman, beneficiaries or legal representative.

(2) Unless such election is made within 20 days from the receipt or service of such demand and unless, after making such election, an action against such third person is instituted within such time as is granted by the commission, the workman, beneficiaries or legal representative is deemed to have assigned his cause of action to the commission.

APPENDIX B

U. S. Ct. of App. 9th Cir., Rule 18(f), 28 U.S.C. provides:

> "Where exhibits are a part of the record, counsel for appellant in an appendix to his opening brief shall set forth in table form in adjoining columns page references to the record where the exhibits were identified, offered and received or rejected as evidence."

Since appellant refused to obey the dictates of Rule 18 (f) the duty devolves to appellee. Unfortunately, this Court's order on appellee's alternative motion forwarded only the record for use in preparation of the brief; the exhibits were not returned so that the numbering could be checked for accuracy. Hence, there is a deviation between the numbering system which appellant uses and that which appellee believes properly reflects the record.

The following table reflects the exhibits of both parties, all of which were received. A brief notation accompanies each exhibit as a description.

DEFENDANT'S EXHIBITS

	Exhibit	Identified	Offered	Received
Def. 1	Letter from SIAC to Gates April 21, 1965	I R 34	II R 14	II R 14
Def. 2	September 14, 1965, Physicians Statement	I R 34	II R 14	II R 14
Def. 3	Seven sheets of SIAC correspondence	I R 34	II R 14	II R 14
Def. 4	Letter from SIAC to Gates June 9, 1965	I R 34	II R 14	II R 14

DEFENDANT'S EXHIBITS

Exhibit		Identified	Offered	Received
Def. 5	Letter from Gates to SIAC May 20, 1965	I R 34	II R 14	II R 14
Def. 6	Two sheets of SIAC correspondence regarding contribution	I R 34	II R 14	II R 14
Def. 7	Four sheets of SIAC correspondence	I R 34	II R 14	II R 14
Def. 8	Attending physican's statement	I R 34	II R 14	II R 14
Def. 9	SIAC Accident Report Form	I R 34	II R 14	II R 14
Def. 10	Denial Petition for Rehearing	I R 34 II R 17	II R 14	II R 14
Def. 11	SIAC Order, Temporary Total Disability	I R 34 II R 17	II R 14	II R 14
Def. 11a	Change in Customer Records	I R 35	II R 14	II R 14
Def. 11b	Two sheets re coverage determination	I R 35	II R 14	II R 14
Def. 11c	SIAC file	I R 35	II R 18, II R 22	II R 22
Def. 11d	SIAC file	I R 35	II R 18, II R 22	II R 22
Def. 12	Return of information filed by corporation	I R 35	II R 14	II R 14
Def. 13	Columbine Application for Certificate to Withdraw	I R 35	II R 14	II R 14
Def. 14	Columbine Certificate of withdrawal	I R 35	II R 14	II R 14

PLAINTIFF'S EXHIBITS

Exhibit		Identified	Offered	Received
Pl. 11	Payroll vouchers, Gates to Feist	I R 32	II R 15	II R 15
Pl. 12	Letter from Gates to Feist dated April 30, 1965	II R 32	II R 15	II R 15
Pl. 13	Certificate of authority of Gates, Oregon, August 28, 1963	I R 32	II R 15	II R 15

PLAINTIFF'S EXHIBITS

Exhibit		Identified	Offered	Received
Pl. 14	Articles of Incorporation of Bud's Tire Exchange June 10, 1960	I R 32	II R 15	II R 15
Pl. 14a	Certificate of Voluntary Dissolution of Bud's Tire Exchange, February 21, 1962	I R 32	II R 15	II R 15
Pl. 15	Bud's Tire Exchange Annual Corporation Returns, February 21, 1962	I R 33	II R 15	II R 15
Pl. 16	Application for Certificate of Authority, February 21, 1962	I R 33	II R 15	II R 15
Pl. 17	Columbine Certificate of Corporate Standing, Colorado January 11, 1962	I R 33	II R 15	II R 15
Pl. 17a	Oregon Certificate of Authority, Columbine, February 21, 1962	I R 33	II R 15	II R 15
Pl. 18	Oregon Certificate of Withdrawal, Columbine, April 26, 1965	I R 33	II R 15	II R 15
Pl. 19	Columbine's Annual Report	I R 33	II R 15	II R 15
Pl. 20	Colorado Certificate, Not in Good Standing, March 22, 1966	I R 33	II R 15	II R 15
Pl. 20a	Colorado Certificate of Good Standing, April 18, 1966	I R 33	II R 15	II R 15
Pl. 21	SIAC Employer's Payroll and Contribution Report March 17, 1965	I R 33	II R 15	II R 15
Pl. 22	SIAC Notice of Rejection Gates, May 27, 1965	I R 33	II R 15	II R 15
Pl. 23	National Tire Dealer's Letter of April 12, 1966	I R 33	II R 15	II R 15
Pl. 24	Letter from Medford City Auditor, March 21, 1966	I R 33	II R 15	II R 15
Pl. 25	Poor's Corporate Register, Gates, 1965	I R 33	II R 15	II R 15

PLAINTIFF'S EXHIBITS

	Exhibit	Identified	Offered	Received
Pl. 26	Title Company Letter April 5, 1966	I R 33	II R 15	II R 15
Pl. 27	Rejection letter	I R 33	II R 15	II R 15
Pl. 28	Physician's statement June 28, 1965	I R 33	II R 15	II R 15
Pl. 29	Gates' letter to Feist September 23, 1965	I R 33	II R 15	II R 15
Pl. 30	Doing Business Certificate	I R 33	II R 15	II R 15
Pl. 31	PUC Coverage	I R 33	II R 15	II R 15
Pl. 32	Articles of Incorporation Columbine	I R 38	II R 15	II R 15
Pl. 33	Columbine Annual Reports 1965, 1966	I R 39	II R 15	II R 15
Pl. 34	Colorado Certificate in Good Standing, September 1, 1966	I R 39	II R 15	II R 15
Pl. 35	Bud's Tire Exchange—Certificate of Non-Incorporation, Colorado	I R 39	II R 15	II R 15
Pl. 36	Gates' Annual Reports 1965-1966	I R 39	II R 15	II R 15
Pl. 37	Gates' Rubber, Inc., Colorado Annual Reports, 1965, 1966	I R 39	II R 15	II R 15
Pl. 38	Gates' Rubber Company Sales Division, Wyoming, Certificate and Withdrawal	I R 39	II R 15	II R 15
Pl. 39	Certificate of Withdrawal re 38, August 20, 1963	I R 39	II R 15	II R 15
Pl. 40	Warranty Deed, November 29, 1961	I R 39	II R 15	II R 15
Pl. 41	Warranty Deed, November 29, 1961	I R 40	II R 15	II R 15
Pl. 42	Deed from Gates' Sales Division to Gates	I R 40	II R 15	II R 15
Pl. 43	Pleading File in Bud's Tire Exchange v. Oakes	I R 44	II R 15	II R 15

PLAINTIFF'S EXHIBITS

	Exhibit	Identified	Offered	Received
Pl. 44	Letter from Wyoming Secretary of State re Gates	I R 44	II R 15	II R 15
Pl. 45	Advertisement	I R 40	II R 15	II R 15
Pl. 46	Advertisement	I R 40	II R 15	II R 15
Pl. 47	Advertisement	I R 40	II R 15	II R 15
Pl. 48	Advertisement	I R 40	II R 15	II R 15
Pl. 49	Advertisement	I R 40	II R 15	II R 15
Pl. 50	Advertisement	I R 41	II R 15	II R 15
Pl. 51	Advertisement	I R 41	II R 15	II R 15
Pl. 52	Advertisement	I R 41	II R 15	II R 15
Pl. 52	Advertisement	I R 41	II R 15	II R 15
Pl. 54	Employer's Accident Report, August 11, 1965	I R 41	II R 15	II R 15